

STATE OF MICHIGAN
COURT OF APPEALS

TERRENCE O'NEILL,

Plaintiff-Appellee,

v

CHEMTOOL, INC.,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 263936
Wayne Circuit Court
LC No. 04-417558-CK

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff, following a jury trial, in this action to recover unpaid commissions and car allowance expenses allegedly owed by defendant, plaintiff's former employer. We affirm.

Defendant first argues that the only evidence supporting plaintiff's car allowance claim was plaintiff's own testimony, and that this testimony was inadmissible under the parol evidence rule because it contradicted the terms of an April 4, 1997, written agreement between plaintiff and defendant. Defendant did not object to plaintiff's testimony on this basis at trial and, therefore, this issue is not preserved. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 367; 533 NW2d 373 (1995). Accordingly, we review the issue for plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Parol evidence of contract negotiations, or of prior or contemporaneous agreements, is not admissible to contradict or vary the terms of a written contract that is clear and unambiguous. *In re Kramek Estate*, 268 Mich App 565, 573-574; 710 NW2d 753 (2005). The written contract at issue here is an April 4, 1997, promissory note between plaintiff and defendant. The agreement reflects plaintiff's promise to repay a loan from defendant in the amount of \$9,800, pursuant to the terms recited in the promissory note.

At trial, plaintiff testified that after defendant was unable to fulfill its promise to provide him with a company car, defendant agreed that plaintiff would buy the company car, that defendant would loan him the money, and that defendant would pay him a car allowance. Plaintiff admitted signing the promissory note in order to finance his purchase of the car. Contrary to what defendant argues, however, nothing in plaintiff's testimony contradicts the terms of the promissory note, and the promissory note is not itself inconsistent with the existence of an independent agreement to pay plaintiff a car allowance. Thus, there is no merit to

defendant's argument that plaintiff's testimony concerning an agreement to pay a car allowance was inadmissible under the parol evidence rule. Defendant has not established a plain evidentiary error.

Defendant further asserts that even with the evidence, there was no evidence to support the jury's verdict. There is no merit in this argument. Plaintiff's testimony provided adequate evidence to support the verdict.

Defendant next argues that the trial court abused its discretion by admitting evidence of plaintiff's anomalous 2002 commission payments. Defendant argues that the evidence was irrelevant under MRE 401 and unfairly prejudicial under MRE 403. We disagree.

The decision whether to admit or exclude evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Kramek Estate*, *supra* at 573. This standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. *Id.*

In this case, a disputed issue at trial was whether defendant underpaid plaintiff's commissions for the sale of Lubricast 852. Plaintiff claimed that he was entitled to a ten percent commission for the sale of this product, whereas defendant claimed that plaintiff was only entitled to a five percent commission. Evidence that defendant had actually paid plaintiff additional commission after plaintiff complained of an underpayment was relevant because it had a tendency to make it more probable that defendant had agreed that plaintiff was entitled to a ten percent commission for the sale of this product. While defendant characterizes the payments as anomalous, plaintiff sought to have the jury conclude that they were intentional. This was an issue properly left to the jury. Moreover, the evidence was not marginally relevant such that its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. Rather, the evidence was directly probative of a principal factual issue in the case. Further, we find no basis for concluding that the evidence was likely to cause confusion or mislead the jury. The trial court did not abuse its discretion in admitting this evidence.

Defendant also argues that it is entitled to a new trial because the jury's commission verdict was against the great weight of the evidence. Defendant did not preserve this issue by raising it in a posttrial motion. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001). However, we may review an unpreserved issue for plain error that affected substantial rights. *Hilgendorf, supra* at 700.

When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). "If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Id.* at 406-407.

With respect to plaintiff's claim for unpaid commissions, plaintiff testified that defendant failed to pay commissions he was owed for sales he made from August 1998 through December

1998 at the Rawsonville Plant, and that he was owed \$26,347.45 for these commissions. Plaintiff's immediate superior at the time also testified that plaintiff was shorted on his commissions during this time frame. There was also testimony that defendant's vice president acknowledged a problem with these commission payments, agreed to pay plaintiff the balance owed in installments of \$3,000, and made three such payments, but then abruptly stopped. The jury awarded plaintiff \$17,347.45 for unpaid commissions for 1998, an amount consistent with plaintiff's testimony that he was entitled to commissions of \$26,347.45, and received partial payments totaling \$9,000. The jury's verdict with respect to this item is not against the great weight of the evidence.

Plaintiff also sought damages for unpaid commissions earned for the sale of Lubricast 852 from 2001 to 2003, in the amount of \$60,478.10. At trial, there was evidence that salespersons receiving a salary were entitled to one half of the applicable commission rate, and that plaintiff, a salaried salesperson, always sold Lubricast 852 at the highest-tiered pricing structure, which was twenty percent. According to plaintiff, defendant paid him a commission of only 2.5 percent or five percent for the sale of this product. Shortly after plaintiff complained about this, a correction was made to his commission payments for February and March 2002, and he received a ten percent commission for his most recent sales of Lubricast 852. Defendant did not pay the ten percent commission rate in other months, however, and plaintiff submitted evidence showing that he was underpaid by \$60,478.10 for commissions earned from the sale of this product in 2001 through 2003. While defendant asserts that it was entitled to make a unilateral change and that defendant accepted this change by continuing to work for defendant, this argument ignores that plaintiff presented evidence that the existing commission structure provided that he be paid at the ten percent rate. We note that defendant's commission structure was not in writing, and that although defendant now claims that certain individuals had no authority with respect to commissions, at times these persons were actually responsible for plaintiff receiving additional commissions. In all events, the jury awarded plaintiff an amount that was adequately supported by the testimony, and its verdict is not against the great weight of the evidence. While there may have been conflicting evidence, that is not a sufficient ground for granting a new trial. *Allard, supra* at 407.

Accordingly, defendant has not demonstrated a plain error affecting its substantial rights with respect to the jury's verdicts.

Lastly, defendant argues that the trial court erred in instructing the jury in accordance with SJI2d 6.01(c) that it was permitted to infer that certain records not provided by defendant would have been adverse to defendant, if the jury found that defendant did not have a reasonable excuse for not producing the evidence.

This Court reviews claims of instructional error de novo. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). The trial court must give a requested instruction if it is applicable to the case. *Id.* This Court reviews for an abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate. *Id.*

The use note for SJI2d 6.01(c) states that the instruction is appropriate if there is a question of fact with regard to "reasonable excuse," but the court affirmatively finds that the evidence in question was under the defendant's control and could have been produced by it, and the evidence was material, not merely cumulative, and not equally available to the plaintiff. See

also *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 147; 640 NW2d 892 (2002). Although the records at issue here originally had been provided to defendant by plaintiff, it was plaintiff's contention that defendant's agents had made notes on those records at the time promises were made to him. In any event, we are satisfied that even if the court gave the instruction in error, reversal is not required. Instructional error warrants reversal only if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury's verdict would be inconsistent with substantial justice. Otherwise, any error is harmless. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84, 87; 693 NW2d 366 (2005). This Court should not overturn a jury's verdict where there is ample evidence to support the jury's decision. *Clark, supra* at 150.

In this case, there was ample evidence to support the jury's verdict with respect to plaintiff's claim for unpaid commissions, independent of any adverse inference the jury may have drawn from the failure to produce the evidence in question, and we are satisfied that the jury's verdict would have been the same had the court not given the instruction. Therefore, any instructional error was harmless.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ Helene N. White